

37. La Star I.D., 6 FCC Rcd at 6866.

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38. Herbert D. Miller, Jr., was counsel representing USCC in the La Star proceeding.

39. Tr. at 1473-75 (footnote added).

40. See USCC Reply to the Proposed Findings and Conclusions of NOCGSA, pp. 27-30.

41. La Star Ex. 15, p. 3.

42. See id., at p. 3.

43. Tr. at 1379-86.

44. Tr. at 755.

45. La Star I.D., 6 FCC Rcd at 6887.

46. e.

47. Id.

48. La Star Reconsideration Order, 7 FCC Rcd at 3765.

49. Additionally, Potosi Company, in its Opposition to USCC's Petition to Delete or Nullify the Effect of Footnote Three, proffers evidence which contradicts Belendiuk's role as depicted by Nelson. Potosi offers affidavits from its principal who dealt with Nelson and Belendiuk over a proposed 39 dBu contour extension in La Star's application for interim authority. The discussions culminated, according to Potosi, with Belendiuk stating that he would have to call Nelson (as opposed to the three SJI members) for a decision.

50. La Star Ex. 15, p. 2.

51. Tr. at 1473-75.

52. Tr. at 1384.

53. La Star Ex. 15, pp. 3-4.

54. Tr. at 755.

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55. Tr. at 1386.

56. Tr. at 1381-82.

57. Tr. at 1385-86.

58. TDS shall be permitted to continue operating on an interim basis until the question of its qualifications is resolved.

ATTACHMENT B
PETITION FOR STAY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

IN RE APPLICATION OF

TELEPHONE AND DATA SYSTEMS, INC.

For facilities in the Domestic Public
Cellular Telecommunications Service
on Frequency Block B in Market 715,
Wisconsin 8 (Vernon) Rural Service
Area

CC Docket Number
94-11

To: The Commission

PETITION OF
TELEPHONE AND DATA SYSTEMS, INC.
and
UNITED STATES CELLULAR CORPORATION
FOR STAY OF PROCEEDING

Alan Y. Naftalin
Herbert D. Miller, Jr.

KOTEEN & NAFTALIN
SUITE 1000
1150 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036

R. Clark Wadlow
Mark D. Schneider

SIDLEY & AUSTIN
1722 EYE STREET, N.W.
WASHINGTON, D. C. 20036

Its attorneys

March 11, 1994

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SUMMARY

This proceeding was designated for hearing despite the pendency before the Court of Appeals of the central issue on which the *Hearing Designation Order* is based, viz, whether USCC controlled the affairs of La Star. The Court heard oral argument on that appeal nearly five months ago, and the matter is now ripe for decision.

The disputed control finding, which the Commission may soon have to revisit, is the necessary predicate of the *Hearing Designation Order*, which states

"We concluded [in *La Star*] that 'to all appearances, USCC controlled the applicant.' It is from this factual background that we examine the allegations that USCC misrepresented facts and lacked candor in the *La Star* proceeding" (FCC 94-29, Para 15) (footnote omitted).

"Nelson [USCC's president] and USCC had every incentive to suggest that USCC was not in control; thus, there is a strong reason to believe that any inconsistencies and misstatements by Nelson were intentional" (*Id* at Para. 33).

Any action by the Court of Appeals which fails to affirm the *La Star* control findings on which the *HDO* is expressly predicated and alters the background against which the misrepresentation and lack of candor issues are to be examined will require the Commission to revisit the *HDO*.

It is apparent that the *Hearing Designation Order* -- which was adopted and released on the same day, February 1, 1994 -- was issued without the benefit of the Court of Appeals *La Star* decision in order to preserve an opportunity under 47 U.S.C. § 503(b) for the Commission to impose a forfeiture should that ultimately seem appropriate. Release of the *Hearing Designation Order* accomplished that purpose, and grant of the requested stay now would have no impact on that option.

We ask the Commission to stay the present *Hearing Designation Order* for the short time necessary for the Court of Appeals to complete its deliberations and

to render a decision on the *La Star* appeal. This will ensure that FCC and private resources are not wasted by virtue of subsequent disruptions, perhaps at a more critical stage, to deal with this central matter.

BEFORE THE
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To: The Commission

PETITION FOR STAY OF PROCEEDING

Telephone and Data Systems, Inc. (TDS) and United States Cellular Corporation (USCC), specified as parties by the *Memorandum Opinion and Order and Hearing Designation Order* ("HDO") in the above captioned proceeding released on February 1, 1994 (FCC 94-29), file herewith, by their attorneys, their Petition for Stay of the effectiveness of that HDO pending action by the Court of Appeals on their appeals from the Commission's decision in *La Star Cellular Telephone Company*, 6 FCC Rcd 6860, *aff'd* 7 FCC Rcd 3762 (1992), *appeal pending sub nom Telephone and Data Systems, Inc. et al. v. FCC* (Case Number 92-1291).

- I. **This Proceeding Is a Direct Consequence of the Commission's Finding in *La Star Cellular Telephone Company* That USCC Was in Control of La Star.**

In *La Star Cellular Telephone Company*, 6 FCC Rcd 6860, *aff'd* 7 FCC Rcd 3762 (1992), the Commission found USCC to be in control of La Star Telephone Company ("La Star"). USCC vigorously denied that it was in control, and has appealed from the Commission decision (*Telephone and Data Systems, Inc. et al. v. FCC*, case number 92-1291, *et al.*). The appeal was filed almost twenty months ago,

on July 10, 1992, and oral argument was held nearly five months ago, on October 18, 1993. USCC argues in its pending appeal that the Commission's findings on the control issue were contrary to the record evidence, arbitrary, capricious, and wrong. The Court has not yet acted, and the matter remains unresolved.

In Footnote 3 to the *La Star* decision, the Commission stated:

"Because our conclusion in this regard results in the dismissal of La Star's application, we do not reach the question raised in NOCGSA's exceptions of whether La Star's principals lacked candor in their hearing testimony concerning the control of La Star. . . . Questions regarding the conduct of SJI and USCC in this case may be revisited in light of the relevant findings and conclusions here in future proceedings where the other interests of these parties have decisional significance." (7 FCC Rcd at 3767, n. 3).

The "relevant findings and conclusions" in the *La Star* case were about control; there were none as to misrepresentation or lack of candor. USCC's appellate brief observed:

"The FCC's characterization of USCC's conduct in this case is of particular concern to USCC because of the effects of Footnote 3 to the Decision on other FCC proceedings in which USCC and its affiliates are involved.

The fact that the FCC's findings as to USCC's conduct can be applied against USCC in other proceedings, perhaps with no opportunity by USCC to challenge the record support for those findings, makes it essential . . . that the FCC's clearly erroneous findings be scrutinized carefully here." (Appellants' Brief, pp. 11 - 12).

II. The HDO Demonstrates That the Candor Questions Raised by Footnote 3 Are Not "Separate From" the Appealed-From Control Questions.

USCC made a full and, we submit, persuasive, showing in its Court of Appeals brief that the Commission's finding that USCC controlled La Star was contrary to the record, arbitrary, capricious, and wrong. It also demonstrated that *La Star* Footnote 3 required, in all fairness, that the Court consider the merits of its showing on the control matter. Commission counsel declined to dispute the merits

of the control showing, and instead urged the Court not to reach the question of whether USCC was in control of La Star.

With respect to Footnote 3, Commission counsel argued that the "question of candor is separate from the question of whether USCC was in control of La Star..." and on that basis maintained that the presence of Footnote 3 in the FCC decision had nothing to do with whether the Court should review the findings that USCC had been in control of La Star (Brief of the FCC, p. 31). As stated in USCC's Reply Brief,

"FCC Counsel asks this Court to treat those erroneous findings and conclusions as *obiter dictum*, mere surplusage for purposes of the present appeal, but nevertheless binding on and unchallengeable by USCC in future FCC proceedings. We submit that the unfairness of that position, even standing alone, would be sufficient to warrant review by this Court of the FCC findings and conclusions which FCC counsel now elects not to attempt to defend or justify." (Reply Brief of Appellants, pp. 7 - 8).

By the *HDO*, the Commission has initiated action pursuant to Footnote 3 to the *La Star* decision. It has rescinded the grant of a cellular authorization for the Wisconsin 8 Rural Service Area to TDS, and designated its application for that authorization for hearing on issues arising directly from the *La Star* control findings currently on appeal.¹

The *HDO* contains the first statement by the Commission, or indeed anyone, as to exactly what in the record troubled the Commission. It focuses at length on the testimony of USCC President H. Donald Nelson. We now see that Commission counsel were incorrect in stating in the *La Star* appeal that the candor question was "separate" from the control question (Brief of the FCC, p. 31). On the contrary, the

¹ The Commission resolved all questions concerning the Wisconsin 8 authorization, with the exception of those arising out of *La Star*, in TDS' favor (DA 94-29, ¶ 12). TDS was permitted to continue operating on an interim basis pending resolution of the question of its character qualifications arising out of *La Star* (DA 94-29, n. 58).

HDO makes it clear that the present candor question is inextricably intertwined with the control issue now on appeal. It states:

"We . . . concluded [in *La Star*] that 'to all appearances, USCC controlled the applicant.' It is from this factual background that we examine the allegations that USCC misrepresented facts and lacked candor in the *La Star* proceeding." (FCC 94-29, ¶ 15) (footnote omitted)

Despite Commission Counsels' arguments that the Court of Appeals should not review the question of whether USCC was properly found to be in control of *La Star*, since that question was "separate from" the Footnote 3 issues, the *HDO*'s predicates are (a) that the Commission correctly decided in *La Star* that USCC was in control and (b) that USCC's control over *La Star* is the proper "factual background" against which to examine whether USCC presented untruthful testimony concerning the nature of that control. Indeed, the *HDO* takes the Commission's findings of control as the starting point for the Wisconsin 8 hearing. It indicates that since control of *La Star* by USCC would have been fatal to the *La Star* application, "Nelson and USCC had every incentive to suggest that USCC was not in control" (DA 94-29, ¶ 33). And, since their testimony that USCC was not in control was contrary to the Commission's findings in *La Star*, "there is a strong reason to believe that any inconsistencies and misstatements by Nelson were intentional." (*Ibid*). He told the truth as he saw it, regardless of the ultimate determination of the control question; there is no reason to believe otherwise. However, if the control question is ultimately resolved in USCC's favor, the predicate of the *HDO* will have been eliminated.

It is, therefore, obvious that the Commission's control findings in *La Star* are critically important to the present proceeding as now initiated by the *HDO*. Further, unless the Court of Appeals *La Star* decision amounts to a complete affirmation of the Commission's *La Star* control findings, the underpinnings of the *HDO* will be

severely eroded if not entirely eliminated, and the Commission will then have little if any choice but to revisit the matter.² Since, as we show below, there is a substantial likelihood that the Commission will not be affirmed in *La Star*, this proceeding should not go forward until the Court of Appeals has had an opportunity to consider the control question during its deliberations on the pending USCC appeal. If the Commission's findings that USCC controlled *La Star* are overturned, then any basis for its suspicious reading of Mr. Nelson's, and USCC's, testimony is also overturned, and the testimony of USCC personnel to that effect must be perceived as candid. There will then be no reason whatever to start with the belief "that any inconsistencies and misstatements by Nelson were intentional." By waiting for the Court of Appeals to act, the Commission can ensure that once this proceeding has begun, it will not have to be disrupted and that both public and private resources will not be wasted.

III. There Is a Substantial Likelihood That the Court of Appeals Will Act in the near Future and That the Commission's Findings in *La Star* That USCC Was In Control May Very Well Not Be Affirmed.

Oral argument in the *La Star* appeal was heard on October 18, 1993, and the case is now ripe for decision. According to the Clerk of Court, nineteen of the twenty-eight appeals argued between that date and the end of October, 1993 had been disposed of by March 8, 1994.

USCC's brief on appeal provided an in-depth analysis of the record and thereby demonstrated that the Commission's findings that USCC had been in control of *La Star* were unsupported by the record. This showing was not rebutted and, as noted *supra*, Commission counsel urged the Court to affirm the *La Star* decision on other grounds.

² In the event of a nonaffirmance, the Commission will, as a minimum, presumably have to revisit its underlying *La Star* decision in light of the Court's disposition of the *La Star* appeal.

It is apparent from the transcript of the October 18, 1993 oral argument that the Court of Appeals found many problems with the Commission's decision on the control matter, and that the Court of Appeals decision may well be adverse to the Commission. Chief Judge Wald told Commission Counsel, for example,

"I understand what you say is the criteria, but I got to tell you, in 14-1/2 years of sitting on this Court, I find the ability to figure out what was going on between Friday's case and today's case, one of the most difficult tasks that I have come across and I think that what you're . . . bearing a little of the weight, perhaps unfairly so, from the Friday proceeding. But it is not easy to make those two cases sit side by side, I can tell you." (Tr. 33)³

Additionally, we have asked the Court of Appeals to take judicial notice of the *HDO*, and to consider it in deciding whether, and if so how, to deal with the issue of whether USCC was in control of *La Star*. A copy of our request to the Court of Appeals is provided in Attachment A to this Petition, as is a copy of the Court's February 17, 1994 *Order* granting that motion.

In these circumstances, and particularly since the Court of Appeals may well not simply affirm the *La Star* decision, it would be unsound and unfair to proceed without awaiting the Court's decision. Any decision by the Court which is less than a complete affirmation of the Commission's decision will necessitate revisiting the Commission's *La Star* decision, as well as the *HDO*. If the Commission's findings about USCC's participation in *La Star* are held to be erroneous, there may well be no reason to go forward with the hearing at all.

³ The companion case to which Chief Judge Wald referred was *Ellis Thompson Corporation*, 7 FCC Rcd 3932 (1992), on appeal *sub nom Telephone and Data Systems, Inc., et al v. FCC*, case number 93-1192, in which oral argument was held on October 15, 1993. There, the Commission found that no substantial questions had even been raised as to the control exercised by the licensee of a cellular system in Atlantic City, New Jersey, a retired welder living on the West Coast, despite numerous factors indicating that he had relinquished all control to Amcel by virtue of a twenty year management agreement with no termination provisions under which the Atlantic City system was completely integrated with other cellular systems also operated by Amcel.

IV. Until The Impact of the Court of Appeals *La Star* Decision Can be Evaluated, it Will Not be Possible for the Commission to Make any Sound Decision How, or Even Whether, This Case Should Proceed.

It is clear from the *HDO* itself that until the matters now before the Court of Appeals have been resolved, the Commission will not be able rationally to decide whether, how, or on what basis this proceeding should go forward. A fair reading of the record discloses the great extent to which the Commission has been led astray by its erroneous control findings in *La Star* into finding substantial and material questions of fact based on perceived inconsistencies in Mr. Nelson's written and oral testimony, which plainly do not exist.

Even independently of the perceptual deficiencies induced by the erroneous *La Star* control findings, the *HDO* reflects a great misunderstanding of Mr. Nelson's testimony about the nature and functions of the Management Committee, and purports to find in it inconsistencies which do not exist and which even a clear affirmation by the Court of Appeals of the underlying control decision would not justify. Representative examples of the *HDO*'s misinterpretations are provided below:

1. The *HDO* characterizes Mr. Nelson's written testimony that he had "acted on the belief that La Star's Management Committee is controlled by the three members appointed by SJI Cellular" (La Star Exhibit No. 15, p. 2) as testimony that only "the Management Committee controlled the affairs of La Star" (*HDO*, ¶ 18). That is not a reasonable construction of his written testimony, nor is it consistent with the thrust of his testimony as a whole. SJI was owned by the Brady family (La Star Exhibit No. 31, at L-2 pp. 3 - 4), and the SJI appointees to the Management Committee consisted of John Brady, his brother, Pat Brady, and an SJI employee, Sinclair Crenshaw. SJI itself functioned very informally, and its appointees to the La Star

Management Committee hardly behaved as one might expect outside directors in a publicly held corporation to behave; there was no reason for them to do so. Mr. Nelson was not attempting in his written testimony to draw any distinction between the Management Committee, the individual SJI members of the Management Committee, and La Star's attorney, Mr. Belendiuk, which he viewed as essentially interchangeable. To the contrary, he stated in his written testimony that the Management Committee had "functioned on an informal basis" and that "my primary contact during the time I have been a member of La Star's Management Committee has been with La Star's attorney, Arthur V. Belendiuk." (La Star Exhibit No. 15, p. 2). The thrust of his written testimony was that the three SJI members of the Management Committee had the power (by virtue of having the power to cast three out of five votes in the event of a difference of opinion) to direct La Star's actions, and that he did not believe USCC able (by virtue of having the power to cast only two out of five votes) to make La Star act other than in accordance with the wishes of the three SJI members.

2. The *HDO* views Mr. Nelson's written testimony that "all participation by USCC in the activities of La Star was at the specific request of SJI Cellular or the Management Committee" as untruthful, since Mr. Nelson "admitted" on cross examination that the Management Committee never formally voted on any matter (*HDO*, ¶¶ 18 - 19) and claimed that he got his instructions from La Star's counsel, Mr. Belendiuk. (*HDO*, ¶ 20). The *HDO* ignores the facts (a) that Mr. Nelson said in his written testimony that the Management Committee had not functioned formally, and (b) that he did not claim that there had ever been a vote on anything (La Star Exhibit No. 15). And, while the *HDO* accurately quotes a portion of Mr. Nelson's written

testimony as far as it goes, it omits the important part of the sentence shown below in bold face type:

"All participation by USCC in the activities of La Star was at the specific request of SJI Cellular or the Management Committee, **either directly or through La Star's counsel, or independent engineering consultant.**" (La Star Exhibit No. 15, p. 4) (Emphasis added)

3. The *HDO* also takes out of context Mr. Nelson's written testimony that he would confer with SJI "when a particular issue facing the venture required a joint effort to resolve" (*HDO*, ¶29) and suggests that he was less than candid because that gave the "distinct impression" that he conferred with SJI more frequently than was actually the case. The *HDO* quotation leaves out the important word "only," shown in bold in the quotation provided below from Mr. Nelson's written testimony:

"I conferred with the SJI Cellular members of the Management Committee **only** when a particular issue facing the venture required a joint effort to resolve." (La Star Exhibit No. 15, p. 3) (Emphasis added)

The "distinct impression" which this testimony properly creates, read in light of his testimony as a whole, is that his contacts with the SJI members of the Management Committee were infrequent, not that they were frequent. Mr. Nelson also testified that

"I have always viewed the La Star matter as a trivial aspect of USCC's business, for which people other than USCC employees have been primarily responsible, and I have devoted only the minimal time necessary to it; I have not sought opportunities to do more. I do not believe that any La Star activity to date of which I have become aware would have justified my attendance, or the attendance of the other USCC member, Mr. Kenneth R. Meyers, at a La Star management committee meeting in Louisiana or elsewhere outside of Chicago. Nor do I believe that any La Star activity to date would have justified any

more time that I devoted to it." (USCC Exhibit No. 1, p. 16)⁴

4. The *HDO* also construes part of Mr. Nelson's cross examination testimony as to the effect that the three SJI members of the Management Committee always "voted on whatever issue was at hand." (*HDO*, ¶32). That was not his testimony, written or on cross examination. He was asked at the hearing to state the basis of his understanding that the SJI members of the Management Committee had approved the filing of an appeal from the Commission's grant of interim operating authority to NOCGSA⁵, and responded that Mr. Belendiuk had told him that they had done so. He did not testify that anyone ever "voted" on anything; nothing in his testimony even suggests that anyone ever did, and his testimony as to that one instance is that he did not know when or in what manner the SJI members had given their approval of the appeal (Tr. 1385 - 86). That is the **only** matter as to which Mr. Nelson testified that all three SJI members of the committee (as distinguished from one SJI member acting for SJI) had given their individual approvals.

There is no basis in the record for any of the substantial and material questions of fact which the *HDO* purports to raise, and the Commission found misrepresentations

⁴ According to the *HDO*, "USCC was permitted to intervene in the La Star proceeding as a party and was represented by its own counsel." (*HDO*, n. 19). However, USCC was not permitted to intervene until approximately three months after the record had been closed on January 30, 1991. By order released on April 4, 1991 (FCC 91M-1194), the record was reopened to receive USCC Exhibit No. 1 and immediately closed (FCC 91M-1194). Proposed findings were filed on April 8, 1991.

⁵ The appeal was, of course, a pleading prepared by and submitted over the signature of Mr. Belendiuk, La Star's attorney. There is no suggestion in the record that Mr. Nelson had anything to do with writing or filing it.

and inconsistencies where none exist, presumably because of its erroneous perception that USCC was in control of *La Star*.

V. The Present Proceeding Should be Stayed Pending Resolution by the Court of Appeals of the *La Star* Appeal.

Pending resolution by the Court of Appeals of the present *La Star* appeal, we submit that the Commission should stay the present proceeding. In view of the time which has already passed since the *La Star* appeal was filed (almost twenty months) and since the oral argument was held (more than four months), it seems likely that a Court of Appeals resolution of the *La Star* appeal will come very soon. Hence, we seek only a short hiatus, so that the Commission can take proper account of the Court of Appeal's *La Star* decision.

It seems apparent that the *HDO* was adopted and released on the same day, February 1, 1994, without waiting for the Court of Appeals to act on the *La Star* appeal, in order to preserve the Commission's ability to impose a monetary forfeiture under 47 U.S.C. § 503(b) should that ultimately seem appropriate, see *HDO*, ¶ 37. That purpose was accomplished by release of the *HDO*, and grant of the requested stay will not impair the Commission's ability to proceed in that fashion.

The *HDO* has already caused substantial injury to TDS and to USCC, and to go forward with the proceeding before the Court of Appeals has acted would perpetuate that harm and also necessitate the inefficient use of both public and private resources, particularly since the outcome of the *La Star* appeal may very well influence the direction taken by the hearing, if not obviate it.

Conclusion

In view of the above, we ask that the Commission stay the effectiveness of the *HDO* pending action by the Court of Appeals on the pending *La Star* appeal.

Respectfully submitted,

TELEPHONE AND DATA SYSTEMS, INC.
UNITED STATES CELLULAR CORPORATION

By /s/ Alan Y. Naftalin
Alan Y. Naftalin

/s/ R. Clark Wadlow
R. Clark Wadlow

By /s/ Herbert D. Miller, Jr.
Herbert D. Miller, Jr.

/s/ Mark D. Schneider
Mark D. Schneider

KOTEEN & NAFTALIN
SUITE 1000
1150 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036

SIDLEY & AUSTIN
1722 EYE STREET, N.W.
WASHINGTON, D. C. 20036

Its attorneys

March 11, 1994

ATTACHMENT A
PETITION FOR JUDICIAL NOTICE AND ORDER GRANTING MOTION

Oral Argument Was Held on October 18, 1993

Before The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington, D. C.

Telephone And Data Systems, Inc.,)	
United States Cellular Corporation)	Case Numbers
Appellant)	92-1291 and 1294
v.)	
)	
Federal Communications Commission)	
Appellee)	

**MOTION FOR JUDICIAL NOTICE OF
FEDERAL COMMUNICATIONS COMMISSION HEARING DESIGNATION ORDER**

Appellants Telephone and Data Systems, Inc. ("TDS") and its subsidiary, United States Cellular Corporation ("USCC"), hereby ask the Court to take judicial notice of the attached *Memorandum Opinion and Order and Hearing Designation Order* ("HDO") released by the Federal Communications Commission (FCC) on February 1, 1994 (FCC 94-29), and to take cognizance of it in considering the present appeal.

In the FCC's decision here on appeal, *La Star Cellular Telephone Company*, 6 FCC Rcd 6860, *aff'd* 7 FCC Rcd 3762 (1992), the FCC found USCC to be in control of La Star Telephone Company. USCC had vigorously denied that it was in control, and argues in its present appeal that the FCC's findings to that effect were arbitrary, capricious, and wrong. In Footnote 3 to its *La Star* decision, the FCC stated:

"Because our conclusion in this regard results in the dismissal of La Star's application, we do not reach the question raised in NOCGSA's exceptions of whether La Star's principals lacked candor in their hearing testimony concerning the control of La Star. . . . Questions regarding the conduct of SJL and USCC in this case may be revisited in light of the relevant findings and conclusions here in future

proceedings where the other interests of these parties have decisional significance." (7 FCC Rcd at 3767, n. 3).

Appellants' brief previously submitted to this Court observed:

"The FCC's characterization of USCC's conduct in this case is of particular concern to USCC because of the effects of Footnote 3 to the Decision on other FCC proceedings in which USCC and its affiliates are involved.

The fact that the FCC's findings as to USCC's conduct can be applied against USCC in other proceedings, perhaps with no opportunity by USCC to challenge the record support for those findings, makes it essential in USCC's view that the FCC's clearly erroneous findings be scrutinized carefully here." (Appellants' Brief, pp. 11 - 12).

FCC counsel responded that this Court need not (and should not) decide whether USCC was in control of La Star and that, in any event, the Footnote 3 "question of candor is separate from the question of whether USCC was in control of La Star..." (Brief of the FCC, p. 31). As stated in Appellants' Reply Brief,

"FCC Counsel asks this Court to treat those erroneous findings and conclusions as *obiter dictum*, mere surplusage for purposes of the present appeal, but nevertheless binding on and unchallengeable by USCC in future FCC proceedings. We submit that the unfairness of that position, even standing alone, would be sufficient to warrant review by this Court of the FCC findings and conclusions which FCC counsel now elects not to attempt to defend or justify." (Reply Brief of Appellants, pp. 7 - 8).

By the attached February 1, 1994 *HDO*, the FCC initiated action pursuant to Footnote 3 to the *La Star* decision. It rescinded the grant of a cellular authorization for the Wisconsin 8 Rural Service Area to Appellant TDS and designated its application for that authorization for hearing on issues arising from the *La Star* decision here on appeal.¹ According to the attached *HDO*,

¹ The FCC resolved all questions concerning the Wisconsin 8 authorization, with the exception of those arising out of *La Star*, in TDS' favor (DA 94-29, ¶ 12). TDS was permitted to continue operating on an interim basis pending resolution of the question of its character qualifications arising out of *La Star* (DA 94-29, n. 58).

"We . . . concluded [in *La Star*] that 'to all appearances, USCC controlled the applicant.' It is from this factual background that we examine the allegations that USCC misrepresented facts and lacked candor in the *La Star* proceeding." (FCC 94-29, ¶ 15) (footnote omitted)

Notwithstanding the arguments of FCC Counsel described above, that the Court need not review the question of whether USCC was properly found to be in control of *La Star*, the attached *HDO*'s predicates are (a) that the FCC correctly decided in *La Star* that USCC was in control and (b) that USCC's control over *La Star* is the proper "factual background" against which to examine whether USCC presented untruthful testimony concerning the nature of that control. Indeed, the *HDO* states:

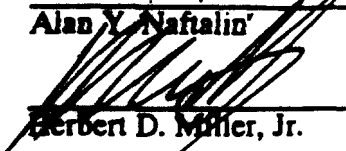
"Nelson and USCC had every incentive to suggest that USCC was not in control; thus, there is a strong reason to believe that any inconsistencies and misstatements by Nelson were intentional." (DA 94-29, ¶ 33).

Unless the Court deals explicitly with the FCC's errors in finding that USCC was in control of *La Star*, the FCC may incorrectly regard its unreviewed findings concerning USCC as confirmed facts in the hearing designated by the attached *HDO*. Indeed, as the quotation immediately above shows, that appears to be contemplated by the attached *HDO*. If the FCC uses the *La Star* findings in that manner, some testimony by USCC witnesses in the *La Star* hearing may be misconstrued as an intentional effort to mislead the FCC into thinking that USCC was not in control. This would be unconscionable if, as we submit, the FCC's findings about USCC's participation in *La Star* are erroneous but are unreviewed by this Court, as Commission Counsel requested.

Accordingly, we ask that the Court take judicial notice of the attached *HDO* and to take cognizance of it in deciding whether, and if so how, to deal with the issue of whether USCC was in control of La Star.



Alan Y. Naftalin



Herbert D. Miller, Jr.

Koteen & Naftalin
Suite 1000
1450 Connecticut Ave., N.W.
Washington, D. C. 20036
(202) 467-5700

Counsel to United States Cellular
Corporation and Telephone and Data
Systems, Inc.

February 8, 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
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FCC 94-29

In re Application of)	CC Docket No. 94-11
)	
TELEPHONE AND DATA)	File No. 10209-CL-P-715-B-88
SYSTEMS, INC.)	
)	
For facilities in the Domestic)	
Public Cellular Telecommunications)	
Radio Service on Frequency Block B,)	
in Market 715, Wisconsin 8 (Vernon),)	
Rural Service Area)	

MEMORANDUM OPINION AND ORDER AND
HEARING DESIGNATION ORDER

Adopted: February 1, 1994

Released: February 1, 1994

By the Commission:

1. The Commission has before it two Applications for Review of the Common Carrier Bureau's (Bureau) decision in Telephone and Data Systems, Inc., 6 FCC Rcd 270 (Com. Car. Bur. 1991). These Applications for Review were filed on February 15, 1991, by a group of applicants which comprised a partial settlement group in the Wisconsin 8 (Vernon) Rural Service Area (hereinafter referred to collectively as the settling partners),¹ and by Telephone and Data Systems, Inc. (TDS). For the reasons stated below, we grant in part the Application for Review filed by TDS and deny the Application for Review filed by the settling partners. In this Order, we additionally designate for hearing character issues concerning a TDS subsidiary's conduct before the Commission and whether this calls in question TDS's qualifications as a Commission licensee.² By ensuring that our licensees are fully qualified, our action will promote full and fair competition to the benefit of the Nation's economy.

¹ The settling partners are: Century Cellunet, Inc. (Century), Contel Cellular, Inc., Conn Valley Farmers Telephone Company, Inc., Farmers Telephone Company, Hillsboro Telephone Company (Hillsboro), LaValle Telephone Cooperative (LaValle), Monroe County Telephone Company, Mount Horeb Telephone Company, North-West Cellular, Inc., Richland-Grant Telephone Cooperative, Inc., Vernon Telephone Cooperative, and Viroqua Telephone Company.

² See La Star Cellular Telephone Company, 7 FCC Rcd 3762, at n.3 (1992).